

IN THE UNITED STATES BANKRUPTCY COURT

FILED

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at 2 O'clock & 35 min. P M

SOUTHERN DISTRICT OF GEORGIA
Waycross DivisionDate 7/14/88
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia PCB

In the matter of:

J. LAVERNE CARTER

Debtor

Chapter 12 Case

Number 587-00111

ORDER ON DEBTOR'S APPLICATION FOR
LEAVE TO SELL PROPERTY AT A PRIVATE SALE

The Debtor in the above-captioned case filed an Application for Leave to Sell certain real estate to his son for an amount which equals the values established by this Court by its previous Order dated February 12, 1988. The Debtor also proposes in his Chapter 12 plan to sell the property to his son in the manner set forth in this separate application and lease it back from his son in order to conduct farming operations on it. The farming operations in turn would generate the funds necessary to make payments to his remaining creditors after satisfaction of the allowed amount of the secured claims which will be paid from the proceeds of the sale. The South Atlantic Production Credit Association objected to the proposed sale and filed a motion for a valuation hearing seeking to have the Court enter an Order adjusting the valuation established by the previous Order dated February 12, 1988, to take into account a

change of circumstances. At a hearing on May 5, 1988, I considered evidence of changed circumstances and concluded that the value of the property which Debtor proposes to sell to his son be increased from \$199,500.00 to \$216,775.00. Evidence was also submitted, together with argument of counsel, as to whether the Debtor had the right to conduct such a private sale. The Debtor proceeds under the authority contained in 11 U.S.C. Section 1206 which provides:

"After notice and a hearing, in addition to the authorization contained in section 363(f), the trustee in a case under this chapter may sell property under section 363(b) and (c), free and clear of any interest in such property of an entity other than the estate if the property is farmland or farm equipment, except that the proceeds of such sale shall be subject to such interest."

Legislative history suggests that the purpose of this section was to permit debtors to scale down the size of their farming operations by selling off unnecessary property and further states "this section modifies 11 U.S.C. section 363(f) to allow family farmers to sell assets not needed for the reorganization prior to confirmation without the consent of the secured creditor, subject to approval of the court." The Conference Report further states that "the holders of secured claims would have the right to bid at the sale to the extent permitted under 11 U.S.C. section

363(k)." Conf. Rep. 99-958, at 51.

The first issue raised by the objecting creditor is whether the Debtor may conduct a sale or whether such sale must be conducted by the Chapter 12 trustee. 11 U.S.C. Section 1203 grants to the Chapter 12 debtor the powers of a Chapter 11 trustee. In the treatise Collier on Bankruptcy, ¶1206.01, at page 1206-3, the author indicates that it is unclear whether the debtor-in-possession has the right to exercise that power since the trustee under Chapter 11 does not enjoy the power to sell property free and clear of liens over the objection of a secured creditor pursuant to Section 363(f). However, since Section 1206 was clearly intended to modify Section 363, so as to permit sales over the objection of a secured creditor, the Debtors right to sell under Section 1203 should not be limited by the literal terms of Section 363(f), but should include the power to sell under that section as modified by the more liberal policy of Section 1206.

As the author of Collier's treatise notes "this is an issue which must be resolved by the courts." Counsel for both the objecting creditor and the debtor have advised the Court that they can find no reported decisions on this point and my research has failed to uncover any authority on the subject as well. Accordingly, in order to effectuate the overall purposes

that Congress had in mind when it enacted Chapter 12 I conclude that the Debtor does have the power of sale under Section 1206, as does the Chapter 12 trustee.

The secondary issue raised is whether the debtor or trustee must conduct a public sale or can be empowered to conduct a private sale under Section 1206. Since the legislative history and 11 U.S.C. Section 363(k) engrafts on the right to conduct a sale the right of the secured creditor to "bid at such sale" unless the court "for cause orders otherwise", it would appear on its face that only public sales are contemplated by Section 363. Again, there appear to be no decided cases to guide this Court in reaching a decision. I have struggled with this in attempting to resolve this issue and have concluded that the Debtor is empowered after Court approval to conduct a private sale. I reach that conclusion in part because Section 363(k) permits the Court "for cause" to prohibit a secured creditor from bidding at a public sale. 11 U.S.C. Section 363(b) requires that notice and a hearing be provided for any sale out of the ordinary course of business. It is the long and customary practice in this District to permit private sales, on a case by case basis, when it is shown that such a means of disposition is in the best interest of all parties in terms of maximizing the return to the estate and therefore the ultimate benefit to the creditors. To adopt a rule for Chapter 12 cases that differed from that would

eliminate the possibility of the negotiation of and sale of properties through private means that might very well exceed what could be obtained at an auction or other public sale. As a result I cannot read Section 363(k) as mandating that public sales be conducted. Rather, it is simply a provision giving the secured party the right to bid at a public sale if, in fact, there is one, unless the Court for cause orders otherwise. The power to order otherwise certainly must include the power to approve a private sale. Moreover, Bankruptcy Rule 6004(f) expressly permits sales to be conducted by public auction or private sale. Accordingly, I conclude as a general proposition that given the proper showing, the sale by a Chapter 12 debtor may be approved even though it is a private sale.

Finally, I come to a consideration of whether this particular private sale as proposed by the Debtor should be approved. I have carefully considered the testimony of the Debtor which indicates that he was a highly successful farmer until the late 70's when many of the economic and meteorological disasters that have afflicted so many farmers in this area put him in an increasingly untenable position. I have further considered the fact that the Debtor is proposing to sell the property to his son at a value which equals the value set by previous Order of this Court, with respect to which there has been no appeal taken. The result of such a sale and the payment

of the proceeds of that sale to the secured creditors would provide for cash payment to them of the entire secured portion of their claim in this case as defined by 11 U.S.C. Section 506. Those creditors' rights to participate in the Debtor's Chapter 12 plan with respect to the unsecured portion of their claims would be unimpaired by such a sale. I have also carefully considered the fact that the practical effect of the sale of this property and cash payment of the proceeds to the secured creditors may deprive those secured creditors of any possible benefit which might be derived by an upturn in the value of this real estate during the life of the Debtor's Chapter 12 plan. The typical confirmation order employed in this District specifies in paragraph 6 that "The amount of payments to creditors, the value of collateral set forth in the Debtor's plan and the allowed amount of secured claims held by secured creditors are subject to modification during the pendency of this case pursuant to 11 U.S.C. Sections 1229, 502(j) and 506(a)." While there has been no litigation on this subject, that provision is intended to preserve the right of a secured creditor to seek an upward modification in the Debtor's payments as well as the right of the Debtor to seek to modify his plan and pay less should the value of property increase or decrease during the life of the plan. Either effort would be subject to notice and a hearing and the opportunity to object by parties that may be affected. Any effort by the Debtor to sell property prior to the consummation

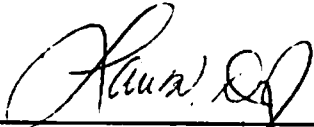
of his payments under the plan, of course, has the result of cutting off any future modification either upward or downward based on changed economic circumstances or fluctuations in the value of real estate. Notwithstanding that fact, as a general proposition, this sale should be approved since the termination of the right to modify based on fluctuations in value could work to the benefit or detriment of either party, so long as such sale is consistent with the Congressional purpose enunciated by the passage of Section 1206.

I have concluded that such purpose is served. The legislative history makes it clear that the right to sell is intended to allow the debtor to dispose of unnecessary property or other assets not needed for reorganization. The Debtor's testimony was that he would be selling the property to his son and leasing it back and would continue to farm all of the acreage involved. Thus, it appears that use of the property, but not necessarily ownership of it, is necessary for the Debtor's reorganization. The advantage to the Debtor is that the rental payment for the land is lower than his debt service. Further, in the event of crop failure, Debtor's failure to make rental payments will not result in a default leading to foreclosure. Rather, the new owner/lessor will have assumed the risk of a failed crop and will bear the burden of meeting his debt service payments if any. In the final analysis, then, sale and lease-

back serves the Congressional purpose behind Chapter 12 in relieving the Debtor of burdensome payment and other ownership obligations.

The fact that this is a sale to an insider raises additional concerns. However, it was not demonstrated that there was any other party willing to pay more for the property than the Debtor's son¹ nor was there evidence that the Debtor was providing the resources to the son with which to purchase the property or any other evidence that the transaction were a mere "sham".

In the absence of such a showing I conclude that the sale can be and hereby is approved.


Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 13th day of July, 1988.

¹ The evidence indicates that PCA would "pay" more in the sense that it would take the property back in satisfaction of its total claim which exceeds in amount the value of the land. However, to allow an undersecured creditor to block a sale solely because it is willing to forgive a larger portion of the debt than the amount of the secured claim would eviscerate Chapter 12 and, in effect, engraft on it the §1111(b) election and absolute priority rule of §1129(b)(2)(B). These were the very obstacles in Chapter 11 to successful farm reorganizations, which resulted in enactment of Chapter 12, with those provisions eliminated.